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Supreme Court of the United States.

OCTOBER TERM, 1972.

No.

RALPH DE SIMONE,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

Ralph De Simone petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit affirming his conviction and his sentence to ten years imprisonment without possibility of parole.

Opinions Below.

There was no opinion in the District Court. The opinion of the Court of Appeals (App. A, *infra*) has not yet been reported.

Jurisdiction.

On January 20, 1972, defendant Ralph De Simone was convicted in the District Court of the Southern District of New York of conspiracy to violate the narcotics laws, namely 21 U.S.C. §§ 173 and 174. On March 6, 1972, he was sentenced under the minimum-sentence, no-parole provisions of 21 U.S.C. § 174 and 26 U.S.C. § 7237 (d). On appeal, his conviction and sentence were affirmed in a judgment of the United States Court of Appeals for the Second Circuit entered November 6, 1972. This Court has jurisdiction to review his sentencing and conviction under the provisions of 28 U.S.C. § 1254.

Questions Presented.

I. Whether the proviso in 26 U.S.C. § 7237 (d) prohibiting consideration for parole for certain narcotics violators applies to persons convicted and sentenced after its repeal for acts committed prior to repeal.

II. Whether the proviso in 26 U.S.C. § 7237 (d) prohibiting suspension of sentence or probation for certain narcotics violators applies to persons convicted and sentenced after its repeal for acts committed prior to repeal.

III. Whether the provisos of 26 U.S.C. § 7237 (d) and 21 U.S.C. § 174, which establish a minimum sentence and prohibit consideration for probation or parole, apply to persons who are indicted and convicted for conspiracies which began prior to and continued after the date of repeal of §§ 174 and 7237 (d).

IV. Whether the District Court had jurisdiction to try a defendant charged with conspiracy to violate 21 U.S.C. §§ 173, 174 under an indictment charging that the conspiracy continued until a date after the effective date of repeal of §§ 173 and 174.

Statutory Provisions Involved.

1 U.S.C. § 109, 61 Stat. 635.

The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture or liability. . . .

21 U.S.C. § 173, 46 Stat. 586.

It is unlawful to import or bring any narcotic drug into the United States or any territory under its control or jurisdiction; except that such amounts of crude opium and and coca leaves as the Commissioner of Narcotics finds to be necessary to provide for medical and legitimate uses only may be imported and brought into the United States or such territory under such regulations as the Commissioner of Narcotics shall prescribe, but no crude opium may be imported or brought in for the purpose of manufacturing heroin. All narcotic drugs imported under such regulations shall be subject to the duties which are now or may hereafter be imposed upon such drugs when imported.

21 U.S.C. § 174, 70 Stat. 570.

Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be im-

prisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000.

26 U.S.C. § 7237 (d), 70 Stat. 568.

Upon conviction—

(1) of any offense the penalty for which is provided in subsection (b) of this section, subsection (c), (h), or (i) of section 2 of the Narcotic Drugs Import and Export Act, as amended, or such Act of July 11, 1941, as amended, or

(2) of any offense the penalty for which is provided in subsection (a) of this section, if it is the offender's second or subsequent offense,

the imposition or execution of sentence shall not be suspended, probation shall not be granted, section 4202 of title 18 of the United States Code, shall not apply, and the Act of July 15, 1932 (47 Stat. 696; D.C. Code 24–201 and following), as amended, shall not apply.

Pub. L. 91-513, 84 Stat. 1236 *et seq.*

§ 1101. (a) The following provisions of law are repealed:

. . . . . .

(2) The Narcotic Drugs Import and Export Act (21 U.S.C. 171, 173, 174-184, 185).

. . . . . .

(b) (4) (A) [26 U.S.C. 7237] (relating to violation of laws relating to narcotic drugs and marihuana) . . . [is] repealed.

§ 1103. (a) Prosecutions for any violation of law occurring prior to the effective date of section 1101 shall not be

affected by the repeals or amendments made by such section . . . or abated by reason thereof.

§ 1105. (a) Except as otherwise provided in this section, this title shall become effective on the first day of the seventh calendar month that begins after the day immediately preceding the date of enactment.

Statement of the Case.

The defendant, Ralph De Simone, was indicted on June 2, 1971, for conspiring to import narcotic drugs in violation of 21 U.S.C. §§ 173 and 174. The indictment alleged that the conspiracy had lasted from approximately December 1, 1967 until the indictment was filed on June 2, 1971, and it specified four overt acts performed in furtherance of the conspiracy. The last of these was alleged to have taken place on May 17, 1971 (App. A). De Simone pleaded not guilty, but after three days of trial in January 1972 he changed his plea to guilty. On March 20, 1972, he was sentenced to ten years in prison and fined $20,000, pursuant to the provisions of 21 U.S.C. § 174 (which imposes a minimum five-year sentence) and 26 U.S.C. § 7237 (d) (which prohibits probation or parole in certain narcotics cases). Both 21 U.S.C. §§ 173, 174 and 26 U.S.C. § 7237 (d) had been repealed as of May 1, 1971, by P.L. 91-513, §§ 1101 (a) (2), (b) (4) (A), 84 Stat. 1291, 1292 (Comprehensive Drug Abuse Prevention and Control Act). Thus, the defendant was convicted and sentenced subsequent to the May 1, 1971, repeal date, for a conspiracy which was alleged to have begun before the repeal date and continued after it. Under the new law, 21 U.S.C. §§ 801 *et seq.*, which went into effect on the repeal date of the old law, there is neither a general minimum mandatory sentence nor a general ban on probation or parole. At the sentencing hearing, De Simone's

attorney asked the court to "note my objection to the defendant De Simone being sentenced under 173 and 174" on grounds that the sentencing provisions of the new drug law should have been applied (App. A).

In his appeal to the United States Court of Appeals for the Second Circuit, defendant De Simone argued, *inter alia*, that the no-parole proviso of § 7237 (d) did not apply to him, since he was convicted and sentenced after its repeal. He maintained that the savings clause in the repealing act, P.L. 91-513, § 1103 (a), did not apply to preserve the no-parole proviso, because § 1103 (a) only provided that "prosecutions" for prior violations of parole would not be affected by repeal, and consideration for parole was not part of the "prosecution." De Simone further maintained that even if § 1103 (a) were construed to save the no-parole proviso of § 7237 (d) in cases where the crime was committed prior to the repeal by the conviction, and sentence occurred afterwards, the no-parole proviso would nevertheless not apply to his case, since the conspiracy with which he was charged did not terminate until after the repeal. The Court of Appeals rejected these arguments and affirmed the conviction and sentence on November 6, 1972 (App. A).

Reasons for Granting the Writ.

I. Certiorari should be Granted on Questions I and II because these Important Questions of Federal Law are Identical to those Raised in Another Case in which this Court has Already Granted Certiorari.

This Court has already granted certiorari in a criminal case raising the same two issues presented by Questions I and II of this petition. See *United States* v. *Bradley*, No. 71-1304, cert. granted 40 U.S.L.W. 3588 (June 12, 1972),

which raises the issues of whether the proviso in 26 U.S.C. § 7237 (d) prohibiting probation and parole applies to persons convicted after its repeal for crimes committed prior to repeal.[1] The importance of these issues is amply evidenced by the grant of certiorari in the *Bradley* case and the widening conflict between the Courts of Appeals. *Compare United States* v. *Stephens*, 449 F. 2d 103 (9th Cir. 1971) *and United States* v. *McGarr*, No. 72-1108 (7th Cir., April 28, 1972), *with United States* v. *Bradley*, 455 F. 2d 1181 (1st Cir. 1972) *and United States* v. *De Simone*, No. 72-1311 (2d Cir., November 6, 1972).

A grant of certiorari will serve the ends of judicial economy. If the judgment of the Court of Appeals is reversed in *United States* v. *Bradley*, the petition of defendant De Simone can be summarily disposed of, without any need for him to start anew by means of a petition in the District Court under 28 U.S.C. § 2255. If *United States* v. *Bradley* is affirmed, then the further issues raised in Questions III and IV, *infra*, should be decided by this Court in order to clarify the sentencing procedures under the federal drug laws.

II. Certiorari should be Granted on the Issues Raised by Questions III and IV.

A. Questions III and IV Present Important Issues of Federal Law about which Two Courts of Appeals are in Conflict.

Defendant De Simone was charged with a conspiracy which allegedly began prior to May 1, 1971, and continued after that date. Questions III and IV raise the issue of whether a defendant charged with such a conspiracy can be

[1] With the consent of the parties, defendant De Simone has filed a brief *amicus curiae* in *United States* v. *Bradley*.

convicted and sentenced under the provisions of drug laws which were repealed effective May 1, 1971, instead of under the more lenient federal drug act which became effective May 1, 1971. These issues were not raised in *United States* v. *Bradley, supra,* where the conspiracy charged was completed prior to the May 1, 1971, repeal date. If this Court limits itself to the issues raised in *Bradley,* it will be dealing with only one aspect of the sentencing problems raised by the broad changes in the federal drug laws which took place in May 1971. The many issues raised by the May 1971 repeal should be settled at this time, or the disposition of *Bradley* will only open the door to further uncertainty.

There is already a direct conflict between two Courts of Appeals about the rule for sentencing a defendant convicted of a conspiracy which spans the repeal and replacement of a statute. In *Leyvas* v. *United States,* 371 F. 2d 714 (9th Cir. 1967), the Ninth Circuit held that the sentencing had to take place under the later law instead of the earlier one. In the instant case, the Court of Appeals for the Second Circuit upheld a sentence imposed under the old law instead of the new one, apparently giving the prosecutor the choice of indicting under whichever law was the most harsh. The Second Circuit acknowledged that the *Leyvas* opinion held that the later statute should be used, but it disposed of *Leyvas* with the vague statement that "[a]lthough there may perhaps be instances in which such a rule should be followed, we are persuaded, in light of the savings provisions of the Drug Control Act and section 109, that Congress did not intend to impose such a requirement in a case like this." (App. A at 25.) The Court cited no authority for its conclusion.

The conspiracy issues raised by defendant De Simone's case are at least important as the savings clause issues that his case shares with *United States* v. *Bradley.* The savings

clause issues raised in the *Bradley* case relate to the drug laws repealed on May 1, 1971, and are only marginally relevant to other criminal statutes, whereas the conspiracy issues involved in the De Simone case can arise whenever a criminal statute is repealed and replaced. The disagreement between the circuits on this issue is likely to broaden unless it is resolved by this Court.

B. The Issues Presented by Questions III and IV were Wrongly Decided by the Second Circuit Court of Appeals.

For the following reasons, the Court of Appeals erred in holding that De Simone should be sentenced under the drug laws repealed on May 1, 1971:

1. *In a Continuing Conspiracy Case, where the Statute or Penalty has been Altered in Mid-Conspiracy, the Penalty Obtaining at the Close of the Conspiracy Governs the Sentence to be Imposed.*

Many cases present examples of criminal conspiracy statutes or penalty provisions being altered while a conspiracy is proceeding. Frequently, courts have adhered to the doctrine which dictates that in such cases, the sentencing court should impose sentence under the standard obtaining in the latter part of the conspiracy. In cases where the later penalty has been the harsher one, the courts have still accepted the doctrine, despite the general maxim that in criminal cases, any doubt should be resolved in favor of lenity.

Thus, in *Huff* v. *United States,* 192 F. 2d 911 (5th Cir. 1951), the defendants were convicted for conspiracy to violate the Internal Revenue laws relating to distilled spirits. At the time the conspiracy commenced, the statute (being the general federal conspiracy statute, the precursor of the

current 18 U.S.C. § 371) provided a prison sentence of not more than two years. While the conspiracy was transpiring, the statute was amended and the penalty was increased to five years. The defendants, wanting to take advantage of the earlier, more lenient penalty provision, argued that since "the offense of conspiracy is complete upon the meeting of mind in an agreement for a violation of a federal statute," therefore, "persons so conspiring are subject to prosecution upon the commission of the first overt act." 192 F. 2d at 914. They further argued that since the crime was complete while the old statute was in effect, they had to be sentenced under the old, rather than under the new, statute. (*Id.*) The Court of Appeals for the Fifth Circuit held that it was proper to sentence under the later, harsher provision and that this did not constitute an *ex post facto* law. See also *United States* v. *Jackson*, 94 F. Supp. 912 (E.D. S.C. 1951), *People* v. *Walczak*, 315 Ill. 49, 145 N.E. 660 (1924), and *State* v. *Hayes*, 127 Conn. 543, 18 A. 2d 895 (1941).

In the instant case, the Court of Appeals for the Second Circuit sought to distinguish *Huff* v. *United States*, *supra*, and *United States* v. *Jackson*, *supra*, by noting that "these decisions did not purport to *require* the application of the later law." (App. A at 25.) (Emphasis in original text.) However, this reasoning does not justify the result reached by the Court of Appeals. If the district court judge had the choice of sentencing under either the old or new law, then the judgment should have been remanded to the district court judge with instructions that he was not bound by prior Second Circuit cases such as *United States* v. *Ross*, 464 F. 2d 376 (1972), and that he could sentence under the new law if he were so inclined.

In one of the most fully reasoned opinions on the subject, the Ninth Circuit held that an increased penalty enacted in mid-conspiracy *must* be applied. In *Leyvas* v. *United States*,

371 F. 2d 714 (9th Cir. 1967), the conspiracy was formed, and all of the overt acts occurred prior to the amendment of the statute, but the court relied on the fact that, no matter when the overt acts were committed, the body of the indictment charged a conspiracy which continued until after the new, harsher statute was in effect. The court remanded to the district court judge for imposition of the longer sentence.

Ironically, *Leyvas* was sentenced under a harsher statute because the penalty provision related to 21 U.S.C. § 174 was made *harsher* in mid-conspiracy. De Simone was sentenced under a harsher statute when the 21 U.S.C. § 174 sentencing provision was made *less harsh* in mid-conspiracy! If the trial court in *Leyvas* did not have the power to choose between sentencing under the old or under the new statutes, then the trial court here should not have such a choice.

2. *Generally, a Conspiracy is Considered to Take Place at the Latest, rather than at the Earliest, Date in Cases Where it is Necessary to Pinpoint the Conspiracy in Time.*

In various legal contexts it is necessary to pinpoint the time of "occurrence" of a continuing conspiracy. For example, the date for tolling the statute of limitations in a conspiracy is the latest date that the conspiracy existed. The statute runs from the termination, rather than from the commencement, of the conspiracy. *United States* v. *Kissel,* 218 U.S. 601 (1910); Developments in the Law—Conspiracy, 72 Harv. Law Rev. 920, 961-962 (1959); *Hyde* v. *United States,* 225 U.S. 347, 32 S. Ct. 793 (1912). And where a conspiracy is initiated at a time when the object thereof is not criminal, but where a statute is passed in mid-conspiracy making the object criminal, it is the latter part of the conspiracy which is taken into account for purposes of determining liability. *Christianson* v. *United States,* 226 F. 2d

646 (8th Cir. 1955). See also *People* v. *Walczak*, 315 Ill. 49, 145 N.E. 660, 661 (1924).

Furthermore, the "occurrence" of the crime of conspiracy cannot be pinpointed at the earlier portion because of the peculiar problems attached to voluntary withdrawal from a continuing crime. It is established that a defendant may at any time voluntarily withdraw from a conspiracy by renouncing participation. In some cases, such withdrawal may even have the effect of relieving the man of criminal liability. See Wechsler, Jones and Korn, The Treatment of Inchoate Crimes in the Model Penal Code, 61 Colum. L. Rev. 957, 1003-1006 (1961). But at the very least, withdrawal relieves a former participant from liability for acts committed after his renunciation of membership. See *Glazerman* v. *United States*, 421 F. 2d 547 (10th Cir. 1970), cert. denied, 398 U.S. 928; *United States* v. *McGuire*, 249 F. Supp. 43 (S.D. N.Y. 1965), aff'd 381 F. 2d 306, cert. denied, 389 U.S. 1053. See also 72 Harv. Law Rev., *supra*, at 957. In this sense, total, irrevocable liability for the conspiracy is not incurred until it is either broken up by the authorities or until it has accomplished its purpose and ended of its own accord.

This matter of the point at which irrevocable liability is incurred in a conspiracy is not without importance when analyzing the effect of a savings clause or statute in a situation such as that of Mr. De Simone. In *Hertz* v. *Woodman*, 218 U.S. 205, 30 S. Ct. 621 (1910), the Court dealt with a question of the obligation to pay an estate tax where the taxing statute involved had been repealed after the death of the testator. The Court went deeply into the "liability incurred" feature of the general federal savings statute and concluded that since the event which sealed the tax liability occurred prior to repeal, the savings statute served to save the statute for purposes of federal collection of the tax after the repeal. The crucial fact was that "the law,

then unrepealed and in full force, operated to fasten, at the moment this right of succession passed by death, a liability for the tax imposed . . . ." And, equally important, "the occurrence of no other . . . event was essential to the imposition of a liability for the statutory tax upon the interest thus acquired." 218 U.S. at 220, 30 Sup. Ct. at 625. See also *Deal* v. *Federal Housing Administration,* 260 F. 2d 793 (8th Cir. 1958).

3. *Defendant's Conviction and Sentence are Void because the District Court had No Jurisdiction to Try him for a Violation of 21 U.S.C. §§ 173 and 174; the Indictment could be Sustained Only if Limited in Time to Post-Repeal Events and Laid under the New Statute.*

The Court of Appeals also erred in rejecting defendant's attack on the validity of his conviction, and hence of the judgment and commitment, pursuant to this indictment under 21 U.S.C. §§ 173 and 174.

Indisputably, the indictment in this case charges a continuing conspiracy which began prior to the May 1, 1971, cut-off date, and lasted until after the cut-off date. Important overt acts occurred prior to the date, but a *major* overt act occurred after the date. (See overt act No. 4 of the Indictment, App. B at 30.) This fourth and final overt act described the occasion on which the defendant was arrested after undercover federal agents effected the sale and transfer of what they represented to be heroin to an alleged agent of the defendant, which act took place on May 17, 1971, sixteen days after the repeal of 21 U.S.C. §§ 173 and 174.[4]

[4] These events are described in the testimony elicited during the days of trial in the District Court which preceded the change of plea to guilty. The Court is respectfully referred to the transcript of these proceedings in the record below (but omitted from the Appendix), United States of America v. Ralph De Simone and Anthony Pagliuca, 71 Cr. 587, 72 Cr. 54, at pp. 4-9, especially 16-19.

As we have pointed out, *supra,* for certain purposes the time of "occurrence" of a conspiracy must be considered to be the end, rather than the beginning, of the continuing course of conspiratorial conduct. This doctrine has particular applicability where in mid-conspiracy a harsher statute defining the unlawful conduct is repealed and replaced by a more lenient or flexible statute defining the same conduct as criminal.

This Court had occasion to consider and debate this very issue in *Rosenberg* v. *United States,* 346 U.S. 273, 73 S. Ct. 1152 (1953), where defendants-petitioners had been indicted and convicted for wartime violation of the Espionage Act of 1917 and were sentenced to death under a provision of that statute which gave the sentencing judge unfettered discretion as to whether or not to impose the death penalty. The indictment charged a continuing conspiracy from 1944 until 1950. In mid-conspiracy, in 1946, Congress passed the Atomic Energy Act, which dealt at least in part with conduct described in the Espionage Act and in the indictment. But for this very same conduct the Atomic Energy Act prescribed that the death penalty could be inflicted only if the conduct was found to be intended to injure the United States and only if the jury recommended death. The claim was made by the petitioners that since the very conduct charged in the indictment, having been a crime under the harsher Espionage Act prior to 1946, became after 1946 a crime *instead* under the Atomic Energy Act, the sentence imposed was unlawful.

Mr. Justice Frankfurter, in a stinging dissent, argued that while the government could have charged a single conspiracy beginning and ending before the cut-off date, or a single conspiracy beginning and ending after the cut-off date, it chose to charge a continuing conspiracy beginning before but ending after the date. "That fact is of decisive importance." 346 U.S. at 304, 73 S. Ct. at 1168. Justice

Frankfurter rejected the government's argument that one could focus only upon the pre-cut-off date activities.

> "The Government having tried the Rosenbergs for a conspiracy, continuing from 1944 to 1950, to reveal atomic secrets among other things, it flies in the face of the charge made, the evidence adduced and the basis on which the conviction was secured now to contend that the terminal date of the Rosenberg conspiracy preceded the effective date of the Atomic Energy Act." 346 U.S. at 305, 73 S. Ct. at 1168.

Mr. Justice Douglas noted that while the "overt acts *alleged* were acts which took place prior to the effective date of the new Act," the fact was that the conspiracy involved acts, and acts were proved, which took place after the new Act became the law." 346 U.S. at 311, 73 S. Ct. at 1171. (Emphasis in the original.) He concluded:

> "Some say, however, that since *a part* of the Rosenbergs' crime was committed under the old law, the penalties of the old law apply. But it is law too elemental for citation of authority that where two penal statutes may apply—one carrying death, the other imprisonment—the court has no choice but to impose the less harsh sentence." 346 U.S. at 312, 73 S. Ct. at 1172.

Justice Black also felt that "it would more nearly fit into the general canons of construction to hold that a District Court could impose sentence only under the less harsh statute." 346 U.S. at 299, 73 S. Ct. at 1165.

The majority in the *Rosenberg* case did not essentially dispute these conclusions of the dissenters. Rather, they based their decision on the conclusion that,

> "The crux of the charge alleged overt acts committed in 1944 and 1945, years before that [Atomic

> Energy] Act went into effect. *While some overt acts did in fact take place as late as 1950, they related principally to defendants' efforts to avoid detection and prosecution of earlier deeds.* Grave doubts of unconstitutional *ex post facto* criminality would have attended any prosecution under that statute for transmitting atomic secrets before 1946. Since the Atomic Energy Act thus cannot cover the offenses charged, the alleged inconsistency of its penalty provisions with those of the Espionage Act cannot be sustained." 346 U.S. at 295-296, 73 S. Ct. at 1164. (Emphasis supplied.)

In the case at bar, we have the situation which the three dissenting justices believed to have existed in *Rosenberg* and which would have invalidated the sentence—the very situation which even the majority in *Rosenberg* strongly hinted would have made the crucial difference. In the case at bar, *major* overt acts, including an overt act (No. 4) alleged and proved, occurred after the cut-off date. No *ex post facto* problem arises since the new Comprehensive Drug Abuse Control and Prevention Act makes this post cut-off date conduct criminal and can cover the offenses charged.

Thus, as a prosecution laid under 21 U.S.C. §§ 173 and 174, the instant indictment charges no offense. An offense is charged only under the new statute. To the extent that the Government insists upon treating this as a conviction under the old statute, and to the extent that the District Court insists upon sentencing under the old statute, the indictment fails to state a crime cognizable under the laws of the United States, and the conviction and sentence must be vacated. Defendant-appellant can be convicted, if at all, only under the substantive and penalty provisions of the new statute. Such an indictment would not run afoul of the

ex post facto prohibition, since it could be appropriately limited to acts which occurred after the effective date of the new law.

Conclusion.

For the reasons stated above, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

HARVEY A. SILVERGLATE,

ROGER C. PARK,

ZALKIND & SILVERGLATE,

Counsel for petitioner.

Appendix A.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 52—September Term, 1972.

(Argued September 13, 1972 Decided November 6, 1972.)

Docket No. 72-1311

UNITED STATES OF AMERICA,
Appellee,

—against—

RALPH DE SIMONE,
Defendant-Appellant.

Before:

FRIENDLY, *Chief Judge,*

LUMBARD and FEINBERG, *Circuit Judges.*

Appeal from conviction and sentencing pursuant to 21 U.S.C. §§ 173, 174 and 26 U.S.C. § 7237(d) on ground, inter alia, that sentencing for conspiracy continuing beyond date of replacement of old sentencing provisions should be under new law, particularly in regard to availability of parole.

Affirmed.

HARVEY A. SILVERGLATE, Boston, Mass. (Zalkind & Silverglate, Roger C. Park, Boston, Mass.; James M. La Rossa, Gerald L. Shargel, New York, N.Y., on the brief), *for Defendant-Appellant.*

IRA LEE SORKIN, Assistant United States Attorney (Whitney North Seymour, Jr., United States Attorney for the Southern District of New York; Peter F. Rient, Assistant United States Attorney, on the brief), *for Appellee.*

FEINBERG, *Circuit Judge:*

On June 2, 1971, appellant Ralph De Simone was indicted for conspiring with others to violate former sections 173 and 174 of Title 21, United States Code, prohibiting the importation of narcotic drugs. The indictment alleged that the conspiracy had lasted from approximately December 1, 1967 until the date of filing of the indictment, and it specified four overt acts performed in furtherance of the conspiracy. The last of these was alleged to have taken place on May 17, 1971. De Simone pleaded not guilty.

In January 1972, after three days of trial before Judge John M. Cannella and a jury in the United States District Court for the Southern District of New York, De Simone changed his plea to guilty. This followed uncontradicted testimony of conspiratorial activity occurring prior to May 1, 1971, which DeSimone acknowledged, when he changed his plea, to be true. On March 20, 1972, Judge Cannella sentenced DeSimone to ten years in prison and fined him $20,000, pursuant to the provisions of 21 U.S.C. § 174 (minimum mandatory five-year sentence) and 26 U.S.C. § 7237(d) (no probation, no parole). However, both 21 U.S.C. §§ 173, 174 and 26 U.S.C. § 7237(d) had been re-

pealed as of May 1, 1971 by the Comprehensive Drug Abuse Prevention and Control Act, §§ 1101(a)(2), (b)(4)(A), 84 Stat. 1291, 1292 (Drug Control Act). Under the new law, 21 U.S.C. §§ 801 *et seq.*, there is neither a general minimum sentence requirement nor a blanket ban on probation or parole in such narcotic cases. Immediately after sentencing, De Simone's attorney asked the court to "note my objection to the defendant De Simone being sentenced under 173 and 174" on the ground that the sentencing provisions of the new Drug Control Act should have been applied. De Simone, who is now serving his sentence, appeals.

De Simone's two principal arguments concern that portion of former section 7237(d) that denied parole to a defendant convicted under 21 U.S.C. §§ 173, 174.[1] Appellant first asserts that the no-parole rule of section 7237(d) does not apply to a defendant sentenced after repeal of the section even though his criminal conduct occurred before repeal. The key statutory provisions bearing on this question are two so-called savings clauses. The new Drug Control Act states in section 1103(a):

> Prosecutions for any violation of law occurring prior to the effective date of section 1101 [repealing, *inter alia*, 21 U.S.C. §§ 173, 174] shall not be affected by the repeals or amendments made by such section . . . or abated by reason thereof.

In addition, there is a general federal savings clause, first enacted in 1871, at 1 U.S.C. § 109, which provides in relevant part:

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[1] This focus on parole is understandable. Since Judge Cannella actually imposed a sentence under the prior statute greater than the mandatory five year minimum, it is not likely that even under the more flexible provisions of the new Drug Control Act the judge would have granted De Simone probation or a shorter prison term. But under the new Act the judge could not have denied parole.

> The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture or liability.

Appellant argues that after May 1, 1971 neither clause "saves" the no-parole rule of section 7237(d). As to the former, appellant asserts that the term "prosecutions" in section 1103(a) does not cover matters relating to parole. As for the latter, appellant says Congress intended to supersede section 109 by section 1103(a) and, in any event, the no-parole provision of section 7237(d) is a "procedural" matter to which section 109 does not apply.

That section 1103(a) applies to sentencing is now well-settled in this circuit. See, *e.g.*, *United States* v. *Ross*, 464 F.2d 376, 379 (1972); *United States* v. *Singleton*, 460 F.2d 1148, 1155 (1972); *United States* v. *Fiotto*, 454 F.2d 252, 255 (1972) (per curiam), cert. denied, 406 U.S. 918 (1972). Accord, *United States* v. *Bradley*, 455 F.2d 1181, 1189, 1191 (1st Cir.), cert. granted, 407 U.S. 908 (1972); but *cf. United States* v. *McGarr*, 461 F.2d 1 (7th Cir. 1972); *United States* v. *Stephens*, 449 F.2d 103, 105 (9th Cir. 1971). These cases clearly hold that when Congress said that "prosecutions for any violation of law" before May 1, 1971 "shall not be affected by the [repeal]" of various narcotics laws, it intended to permit sentencing under the repealed law after a conviction under it. But appellant points out that these cases did not hold that for purposes of section 1103(a) sentencing includes denial of parole. Quoting from *Morrisey* v. *Brewer*, 408 U.S. 471 (1972),[2]

[2] At 408 U.S. 480, the Court said:

> "Parole arises after the end of the criminal prosecution, including imposition of sentence."

appellant seeks to distinguish parole from probation—discussed together in *United States* v. *Ross, supra*—by arguing that probation is an option open to the court at the time of sentence whereas a decision to release a prisoner on parole is made at a later time by an administrative board. From this appellant concludes that a no-parole rule is not part of sentencing at all.

Appellant's argument is a substantial one, but we conclude that it should be rejected. It is true that none of the cases cited above discuss specifically whether the no-parole rule of section 7237(d) is saved by section 1103(a). However, the tenor of *Ross* certainly implies rejection of appellant's view. In *Ross,* we regarded "parole or probation" as both part of the same process, and "as alternatives to prison." 464 F.2d at 379. While the discussion in that case then focused on the section 109 savings clause, we do not believe that to be a significant distinction in this context. Moreover, it is unrealistic to view a decision at the time of sentence regarding the future availability of parole as not part of the sentencing process. Certainly a direction by the sentencing judge in a non-narcotics case that parole be considered at an earlier time than usual[3] would be fairly described as part of the "sentence." We do not see why the reverse side of the coin—a decision to delay or eliminate consideration of parole—should be regarded any differently. And the fact that the decision has already been made by the legislature for all such offenders does not change its essential character. Finally, we do not regard the Court's observation in *Brewer,* made in an entirely different context, as controlling on the issue now before us.

Turning to the effect of section 109, *Ross* seems even more in point since it clearly held that "§ 7237(d) is . . .

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[3] See 18 U.S.C. § 4208(a).

the type of statute which § 109 was intended to save." Id. See also *United States* v. *Fiotto, supra; United States* v. *Bradley, supra; cf. United States* v. *Taylor,* 123 F. Supp. 920 (S.D.N.Y. 1954), aff'd mem., 227 F.2d 958 (2d Cir. 1955), cert. denied, 353 U.S. 961 (1957). Certainly, no section of the Drug Control Act, which repealed sections 173 and 174, meets the command of section 109 that the "repealing Act . . . expressly provide" for extinguishment of a prior "penalty." Moreover, we do not agree that the section is "procedural." We observed in *Ross*: "[O]ne would be hard pressed to find a prison inmate who did not see the unavailability of parole as a penalty." 464 F.2d at 379. The no-parole rule was clearly intended by Congress specifically as a punitive measure. See H.R. Rep. No. 2388, 84th Cong., 2d Sess., U.S. Code Cong. & Admin. News 3283-85 (1956). Furthermore, as appellant concedes, the no-parole rule does have a substantive effect because it prevents imprisonment from ending before the minimum statutory term (less time off for good behavior) is served.

De Simone next argues that even if the no-parole provision of section 7237(d) applies to post-repeal convictions for acts performed before repeal, it cannot apply to a conspiracy continuing after the effective date (May 1, 1971) of the new law. We have not previously dealt with this precise problem, since the earlier cases, cited above, did not involve offenses that continued after May 1, 1971. Nonetheless, this case does not seem significantly different from prior ones. It is true that the indictment alleged a conspiracy extending for about one month beyond the date of repeal of section 7237(d) and that it specified one overt act occurring after repeal. But section 1103(a) applies to "[p]rosecutions for any violation of law occurring prior to the effective date of section 1101 . . . ." In this case, a conspiracy was commenced several years before the effective date of the new provision and three of the four overt

acts cited in the indictment took place during that period. Hence there is no question that a "violation of law [occurred] prior to" May 1, 1971. This violation is the basis of the indictment, and the fact that the conspiracy continued for a time after the change in law does not take the case beyond the reach of section 1103(a).[4]

Appellant directs our attention to several decisions that have upheld sentencing for conspiracy under a law allowing longer sentences that had been enacted during the conspiracy. *E.g., Huff* v. *United States,* 192 F.2d 911 (5th Cir. 1951), cert. denied, 342 U.S. 946 (1952), and *United States* v. *Jackson,* 94 F. Supp. 912 (E.D. S.C. 1951) (both non-narcotics violations). Since the conspiracies in these cases continued after the change, violations of the new law did occur and thus it would be reasonable to allow the lower courts to rely on the more recent sentencing provisions. But these decisions did not purport to *require* the application of the later law.[5] However, in *Leyvas* v. *United States,* 371 F.2d 714 (9th Cir. 1967) (involving narcotics), the court did hold that sentencing had to be pursuant to the provisions of the later law, which in that case were harsher rather than more lenient. Although there may perhaps be instances in which such a rule should be followed, we are persuaded, in light of the savings provisions of the Drug Control Act and of section 109, that Congress did not intend to impose such a requirement in a case like this. Moreover, acceptance of appellant's position is not compelled by any overriding considerations of equity or reasonableness. Appellant's argument on this point assumes that

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[4] For the same reasons, section 109 seems applicable as well.

[5] The court in *United States* v. *Jackson, supra,* appears to have relied, at least in part, on the fact that the bulk of the conspiracy there in question, including four of the five overt acts alleged, took place after the effective date of the new law. See 94 F. Supp. at 913. This reasoning appears to undercut appellant's position.

had he terminated his conspiracy by May 1, 1971, his sentencing under former sections 174 and 7237(d) would have been proper. The fact that he continued in violation of the law for an additional few weeks should not be grounds, absent explicit congressional authorization, for him to demand a more lenient sentence as of right. If further support were needed for the view that at the very least in this case the pre-existing law can be applied, we would note that only a small proportion of the conspiracy is alleged to have taken place after May 1, 1971; the testimony introduced before De Simone pleaded guilty recounted only pre-repeal conspiratorial conduct; De Simone acknowledged when pleading that the testimony was true; and he was aware at the time of his guilty plea that he would be sentenced under the old law.

Appellant's final arguments are jurisdictional. He claims, apparently for the first time, that the district court could not try him for violating sections 173 and 174, because the conspiracy had continued beyond the date of repeal and included during its latter period a significant overt act. Therefore, according to appellant, the indictment and sentencing could only be under the new Drug Control Act. But although this point goes to the conviction itself rather than merely to the sentence, we view it as essentially the same as De Simone's immediately preceding argument regarding a change of law during an on-going conspiracy. Other than the dissenting opinions in *Rosenberg* v. *United States,* 346 U.S. 273 (1953), appellant does not refer us to any sources that suggest that the district court lacks jurisdiction.[6] Finally, appellant seeks to overturn his conviction

[6] In *Rosenberg,* the issue was whether a stay of execution granted by Justice Douglas should be vacated. Appellants claimed that the Atomic Energy Act, ch. 724, § 10(b)(2), (3), 60 Stat. 166, as amended, 42 U.S.C. §§ 2274-75, enacted during their conspiracy and requiring a jury recommendation and a finding of intent to

based upon a novel interpretation of section 1103(a) of the new Drug Control Act. He would read that provision as saving only prosecutions brought prior to the effective date of the Drug Control Act (May 1, 1971) and as barring those brought thereafter, even though based upon pre-May 1, 1971 criminal conduct. Such an interpretation of section 1103(a) comports neither with the language of the provision nor with common sense. The words "occurring prior to the effective date" in section 1103(a) plainly refer to "any violation of law," not to "prosecutions." Moreover, the effect of appellant's analysis would be to exempt from prosecution all violations of former sections 173 and 174 for which indictments had not been filed by May 1, 1971. There is no reason to believe that Congress intended to confer such immunity on drug traffickers.[7]

Affirmed.

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injure the United States as predicates to the imposition of the death penalty, should have been applied in their case. The Court held that their argument raised no substantial question and it vacated the stay. Justices Frankfurther, Black and Douglas dissented.

[7] Compare § 1103(a) with § 1103(b). The latter is explicitly limited to "seizures or forfeitures and injunctive proceedings commenced prior to the effective date of" the new law. If Congress had intended to limit § 1103(a) in the same manner, it presumably would have said so.

Appendix B.

Indictment

United States District Court
Southern District of New York

UNITED STATES OF AMERICA,

v.

RALPH DE SIMONE, and
ANTHONY PAGLIUCA,
Defendants.

71 Cr. 567

The Grand Jury charges:

1. From on or about the 1st day of December, 1967 and continuously thereafter up to and including the date of the filing of this indictment, in the Southern District of New York and elsewhere, Ralph De Simone and Anthony Pagliuca, the defendants, and others to the Grand Jury known and unknown, unlawfully, wilfully and knowingly combined, conspired, confederated and agreed together and with each other to violate Sections 173 and 174 of Title 21, United States Code.

2. It was part of the said conspiracy that the said defendants would unlawfully, wilfully, knowingly and fraudulently import and bring into the United States large quantities of narcotic drugs the exact amount and nature thereof being to the Grand Jury unknown.

3. It was further a part of said conspiracy that the said defendants unlawfully, wilfully and knowingly would receive, conceal, buy, sell and facilitate the transportation, concealment and sale of a quantity of narcotic drugs, the exact amount and nature thereof being to the Grand Jury

unknown, after the said narcotic drugs had been imported and brought into the United States contrary to law, knowing that the said narcotic drugs had been imported and brought into the United States contrary to law in violation of Sections 173 and 174 of Title 21, United States Code.

OVERT ACTS

1. In furtherance of the said conspiracy and to effect the objects thereof, on or about the 1st day of May, 1970, Guillermo Castillo named herein as a co-conspirator but not as a co-defendant, came to Seattle, Washington.

2. In furtherance of the said conspiracy and to further effect the objects thereof, on or about the 4th day of May, 1970, in the Southern District of New York, Anthony Fiotto, named herein as a co-conspirator but not as a co-defendant, came to the George Washington Hotel, 23rd Street, New York, New York.

3. In furtherance of the said conspiracy and to further effect the objects thereof, on or about the 9th day of March, 1971, Ralph De Simone came to the Chuck Wagon Restaurant, Fort Lee, New Jersey.

4. In furtherance of the said conspiracy and to further effect the objects thereof, on or about the 17th day of May, 1971, in the Southern District of New York, the defendants Ralph De Simone and Anthony Pagliuca came to the vicinity of the Sheraton Motor Inn, West 42nd and 12th Avenue, New York, New York.

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Foreman

WHITNEY NORTH SEYMOUR, JR.
United States Attorney

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-837

RALPH DE SIMONE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES

On June 2, 1971, petitioner was indicted for conspiring to traffic in narcotic drugs in violation of 21 U.S.C. (1964 ed.) 173 and 174. The indictment charged four overt acts, three occurring before May 1, 1971, and the last on May 17, 1971 (Pet. App. B). On January 20, 1972, after three days of a jury trial in the Southern District of New York, during which the government presented testimony on events occurring only before May 1, 1971, petitioner changed his plea to guilty (Tr. 2). No evidence had been offered that the conspiracy extended beyond May 1, 1971.

On March 6, 1972, petitioner was sentenced to ten years' imprisonment and fined $20,000 under 21

U.S.C. (1964 ed.) 174, which required at least a five-year sentence, and 26 U.S.C. (1964 ed.) 7237(d), which prohibited the grant of probation, parole, or suspension of sentence, for violations of 21 U.S.C. 174. Both Section 174 and Section 7237(d) had been repealed effective May 1, 1971, by Section 1101 of the Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. 91-513, Title III, 84 Stat. 1291, 1292. The court of appeals affirmed (Pet. App. A), in part following the First Circuit's decision in *United States* v. *Bradley*, 455 F. 2d 1181, certiorari granted, 407 U.S. 908 (No. 71-1304), argued on January 8, 1973, and holding that both the general saving statute, 1 U.S.C. 109, and the specific saving statute in the 1970 Act operated to preserve the applicability of Section 174 and Section 7237(d) to conduct committed while these sections were in force.

Prior to accepting petitioner's guilty plea the court inquired whether he was aware of the punishment applicable in his case, and petitioner responded that it was a minimum of five years' imprisonment (Tr. 6). Government counsel interjected that he wished to inquire through the court whether, although the issue was being litigated in the *Fiotto* case,[1] petitioner was

[1] *United States* v. *Fiotto*, 454 F. 2d 252 (C.A. 2), certiorari denied, 406 U.S. 918, No. 71-1114. The instant case involves activities allegedly taking place between petitioner and Fiotto and others (Tr. 5). Petitioner stated that he was aware the same judge had also sentenced Fiotto and that he knew what Fiotto's sentence was (Tr. 7). (The sentence in *Fiotto* under 21 U.S.C. 174 and 26 U.S.C. 7237(d) was affirmed.) Petitioner also then assured the judge he "was taking a chance on what the sentence is" (Tr. 8). Petitioner's objection to sentencing under the old law was raised only after his sentence had been imposed (March 6, 1972, Tr. 14).

aware he would not be eligible for parole (Tr. 6). Petitioner and his counsel each responded that petitioner was aware of that fact (Tr. 6); when the court repeated the inquiry, petitioner affirmed his awareness (Tr. 6). In accepting the guilty plea, the judge also inquired of petitioner whether the testimony at trial described what had occurred, and petitioner replied "That's right" (Tr. 7). Then the judge had the charges read to petitioner, omitting, however, the fourth overt act, which had occurred after the repeal of 21 U.S.C. 173, 174 and which the judge therefore declared "out of the scope of the indictment" (Tr. 9-11). The judge inquired whether petitioner understood the charges that had been read and wished to change his plea (Tr. 11). Petitioner responded that he wished to plead "guilty" (Tr. 11).

1. The first issue raised by the petition concerning the retrospective reach of the Comprehensive Drug Abuse Prevention and Control Act of 1970 is similar to the issues raised in *Bradley*, now awaiting decision by this Court.[2] But petitioner received twice the minimum sentence required by former Section 174 (but less than the 15-year maximum permitted under the new law, 21 U.S.C. 841(b)) and there is no indication that the judge would have placed him on probation or suspended his sentence if these alternatives had been available. In addition, if any parole is available, petitioner would not be eligible for consideration until he has served at least one-third of his ten-year sentence. See 18 U.S.C. 4202. By that time, the decision in *Brad-*

[2] Petitioner filed an *amicus* brief in *Bradley*.

ley will presumably have settled the question whether petitioner is eligible for parole. Nevertheless, even though it is difficult to see how a decision in *Bradley* could affect petitioner's sentence, the Court may wish to defer disposition of the present petition pending decision in *Bradley*.

2. Petitioner makes two contentions that do not turn on the decision in *Bradley*. His alternative contentions are (a) that since the conspiracy overlapped the May 1, 1971, effective date of the new Drug Abuse Act, the no-parole, no-probation, and no-suspension-of-sentence provisions of former Section 7237(d) should not be applicable to him in any event, and (b) that the district court lacked jurisdiction under 21 U.S.C. (1964 ed.) 173 and 174 because one of the overt acts occurred after the adoption of the new Act. Both of these contentions misconceive the nature of the offense of conspiracy, and were properly rejected by the court below in an opinion on which we mainly rely. It is well-established that a conspiracy is a continuing offense, in which, from its inception until it has been terminated or accomplished, each conspirator is continuously offending "as certainly, as we have said, as at the first moment of his confederation, and consciously through every moment of its existence". *Pinkerton* v. *United States*, 328 U.S. 640, 646; *Hyde* v. *United States*, 225 U.S. 347, 369.[3] There is therefore no merit

[3] That a conspiracy is a continuously occurring violation is also demonstrated by its capacity to create various places of venue and jurisdiction during its pendency, *Hyde* v. *United States*, *supra*, and to render all the conspirators liable for acts committed in furtherance of the agreement by any one of them, *Pinkerton* v. *United States*, *supra*; *United States* v. *Kissel*, 218

to petitioner's contention that the allegation in the indictment that the conspiracy continued after the effective date of the new statute deprived the court of jurisdiction to try him under the former statute for his violation of it. Trial and sentencing under 21 U.S.C. (1964 ed.) 173 and 174 were particularly appropriate here, since most of the conspiracy charged, and all that was proved before petitioner pleaded guilty, occurred prior to repeal. The trial court considered the post-repeal overt act to be "out of the scope of the indictment" (Tr. 9–11).

Similarly, petitioner's contention that the application of the old law's penalties to him is inconsistent with cases allowing [4] and a case requiring [5] the imposition of penalties which become applicable in mid-conspiracy is not well taken. Since the offense continues throughout the conspiracy, a change in the governing statute during the course of the conspiracy simply means that offenses have been committed under both statutes: it does not give petitioner any special

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U.S. 601, 607–608. Neither result would be possible if conpiracies "occurred" only at the moment of the commencement or, as petitioner contends in order to bring himself exclusively within the new Act, at the moment of their termination.

[4] *E.g.*, *Huff* v. *United States*, 192 F.2d 911 (C.A. 5), certiorari denied, 342 U.S. 946 (application of statute imposing *greater* penalty does not violate prohibition on *ex post facto* laws); *United States* v. *Jackson*, 94 F.Supp. 912 (E.D.S.C.) (trial court properly applied penalties of later statute).

[5] *Leyvas* v. *United States*, 371 F.2d 714 (C.A. 9). There, the conspiracy bracketed the effective date of 21 U.S.C. (1964 ed.) 173 and 174, and the court held that therefore the new five-year mandatory minimum sentence applied. There, as here, the conspiracy was punished under 21 U.S.C. (1964 ed.) 173 and 174 because it existed while the statute was in force.

standing to insist on being charged only with the less severely punishable violation, and indeed the cases on which he relies involve the application of *more* serious penalties that became effective during the commission of the conspiracy. As the court below noted, "[t]he fact that he continued in violation of the law for an additional few weeks should not be grounds, absent explicit congressional authorization, for him to demand a more lenient sentence as of right" (Pet. App. 26).

For the foregoing reasons and for those urged in *Bradley*, we respectfully submit that petitioner has been validly sentenced.

ERWIN N. GRISWOLD,
Solicitor General.

JANUARY 1973.

U.S. GOVERNMENT PRINTING OFFICE: 1973